Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JANICE L. MATTOX AND JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS,
Defendant-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when applying principles of state law to the matters before it, the Federal Court of Appeals may reject the law as established by the intermediate state law courts, and prescribe its preferred interpretation.

2. Whether the Fifth Circuit Court of Appeals erred in holding that the interpretation of the Dallas Development Code, as established by the Texas intermediate courts, should not be followed, and in prescribing its own interpretation of the code.

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JANICE L. MATTOX AND JERRY S. MATTOX,
PETITIONERS

versus

BOARD OF ADJUSTMENT OF THE CITY OF
DALLAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 4, 1996.

1.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not reported. The District Court's opinion and judgment are not reported.

2.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1996. A timely petition for rehearing was denied on October 29, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

3.

ORDINANCE PROVISION INVOLVED

Dallas Development Code, Section 51A-4.704:

> "Any person may request that the Board establish a termination date for a nonconforming use. Upon receiving such a request, the Board shall provide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized within a definite time period. The following factors must be considered by the board in determining a reasonable amortization period;
>
> (A) The owner's capital investment in the structures on the property at the time the use became nonconforming.
>
> ...."

STATEMENT OF THE CASE

The petitioners are the owners of a car wash, which when purchased, was considered a nonconforming use under the City of Dallas zoning ordinances. Under the Dallas Development Code, a nonconforming use is a legal use of property which may be continued until terminated, as provided for in the Dallas Development Code.

An application to terminate the nonconforming use was filed, and a hearing was held before the Dallas Board of Adjustment, to determine a termination date for the nonconforming use of the property. The petitioners challenged the Board's determination by filing suit in a Texas state district court. The Board removed the case to the federal court for the Northern District of Texas, where

trial was before the court without a jury. The trial court and the court of appeals affirmed the decision of the Board of Adjustment.

Under the Dallas Development Code, as interpreted by Texas courts, the petitioners are entitled to amortize any investment made by the previous owner which was made prior to the use becoming nonconforming. Thus, petitioners allege that in this instance the Board of Adjustment abused its discretion by failing to hear evidence of the prior owner's investment.

Petitioners contend that the court of appeals rejected the established Texas law which interpreted application of the Dallas Development Code. By rejecting the law established by the Texas intermediate courts, and inserting its own interpretation of state law, the

court of appeals erroneously affirmed the decision of the Board of Adjustment.

REASONS FOR GRANTING THE WRIT

The facts of this case illustrate a misapplication of this Court's opinions in *West v AT&T*, 311 U.S. 233 (1940), *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and other cases, and present an opportunity for the Court to correct and clarify the Court of Appeal's ability to reject the determinations of intermediate state courts, when applying state law.

1. **THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT QUESTION OF WHETHER, AND TO WHAT EXTENT, THE FEDERAL COURTS OF APPEALS MAY REJECT OR IGNORE THE DECISIONS OF INTERMEDIATE STATE COURTS WHEN APPLYING STATE LAW.**

On previous occasions, this Court has held that when a federal court must apply state law to the proceedings before it, the federal court has a duty to "ascertain and apply that law even though it has not been expounded by the highest court of the state." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940); referring to *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938).

This court established the principle that:

> "An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

Id., at 177-78. In *Fidelity Union*, this Court held that the lower court was not at liberty to determine the state law

question on its own reasoning, independent of the construction given the law by the intermediate courts. *Id.*

The Court expressly affirmed its holding in *Fidelity Union* when it reiterated this rule in *West v. AT&T*, 311 U.S. 223 (1940). There, the Court held that a "federal court is not free to reject the state rule merely because it has not acquired the sanction of the highest state court." at 236-37. The court concluded that a federal court is not free to apply its own interpretation even if it desires to do so, and even if it believes the state Supreme Court may establish a different interpretation in the future. *Id.*, at 238.

Finally, this Court has confirmed that when a state's highest court denies review of particular intermediate court

cases, the federal courts are not free to overturn the intermediate state courts' conclusions of state law, and must follow the intermediate courts' interpretation. *Hicks v. Feiock*, 485 U.S. 624, 630 (1988).

In the case at bar, the court of appeals admitted that two Texas intermediate courts had interpreted the law in a manner consistent with the petitioner's reading. The two determinations represented the sole explorations of the applicable facts and law, and were both denied review by the Texas Supreme Court.

Despite this acknowledgment of the current interpretive status, the court below conducted its own evaluation of the applicable law and rejected use of the Texas intermediate courts'

determinations. To justify this rejection of established state law, the court blindly offered its speculation that the Texas Supreme Court would disagree with the current holdings. The court below then proceeded to perform its own evaluation of the Dallas Development Code.

While the lower court acknowledged that they sat as an *Erie*[1] court, the decision of the court essentially renders the *Erie* doctrine meaningless. Clearly, this Court's long standing *Erie* doctrine dictates that the court of appeals apply the substantive law of the state. *Id.*, at 78. However, the Fifth Circuit court's actions in this case amount to a complete rejection of the established law

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[1] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)

of the state of Texas in contradiction with this Court's instructions.

Thus, this Court is faced with the important task of declaring the proper application of state law by the courts of appeals, and should grant the requested writ of certiorari in order to firmly establish that the lower courts are not at liberty to reject established state law in favor of their own interpretations.

2. **THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE PREVIOUS OPINIONS OF THIS COURT AND THE COURT ERRONEOUSLY REJECTED ESTABLISHED STATE LAW WHILE PERFORMING ITS OWN INTERPRETIVE ANALYSIS.**

The Court of Appeal's decision to ignore the established law of intermediate state courts is in conflict with the opinions articulated by this

Court, and is in contradiction to its duties in applying state law.

The court below acknowledged that on at least two occasions the Texas Courts of Appeals had applied the relevant portion of the Dallas Development Code to a situation identical to the one before the court. On both occasions the intermediate Texas courts held that under the Dallas Development Code a current property owner was entitled to amortize the remainder of the original owner's investment in the property at the time of nonconformity. *See, Board of Adjustment of Dallas v. Patel*, 882 S.W.2d 87 (Tex.App.--Amarillo 1994, writ denied); *Board of Adjustment of Dallas v Patel*, 887 S.W.2d 90 (Tex.App.--Texarkana 1994, writ denied). In both cases, the Supreme Court of Texas declined review of the holdings, by denying the Board's writ.

Despite this clear establishment of Texas law, the court below articulated a belief that the Texas Supreme Court would not have agreed with the aforementioned cases, and subsequently rejected the intermediate courts' holdings. (Appendix A, at a-8)

In doing so, the court below seemingly ignored this Court's holdings in *Fidelity Union* and *West*, where it was clearly stated that:

> " a federal court is not free to reject state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable." Id., at 236-37.

This Court in *West* went on to state that it is the duty of federal courts to:

> "ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may

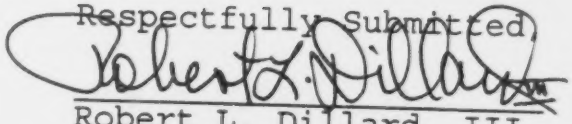
> appear from the viewpoint of general law" *Id.*, at 237

There is little doubt that the court of appeals illustrated discomfort with the determinations of the Texas courts, and simply chose to apply a different interpretation. The basis of the court's rejection of state law was not rooted in any data that the Texas Supreme Court would have held otherwise, and represents an illogical, self-created interpretation of Texas law. This was done in conflict with this Court's holdings, and in conflict with Texas law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-10116

JANICE L. MATTOX AND JERRY S. MATTOX
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS,
Defendant-Appellee.

Appeal from the U.S. District Court
for the Northern District of Texas
(3:93-CV-1043)

Before DAVIS, EMILIO M. GARZA and

STEWART, Circuit Judges.

PER CURIAM:[2]

Plaintiffs Janice and Jerry Mattox appeals the district court's judgment affirming the decision of the Dallas Zoning Board of Adjustment (the "Board"). We affirm.

I.

Plaintiffs are the owners of a coin-operated car wash located in the city of Dallas, Texas. At the time they acquired the property, the car wash was a nonconforming use under relevant city ordinances. At a public hearing, the Board determined a termination date for Plaintiffs' nonconforming use of the property. The Plaintiffs challenged the Board's decision in an action filed in Texas state court. The case was

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[2] Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the

subsequently removed to federal district court under 28 U.S.C. §§ 1441, 1331. The district court had jurisdiction over Plaintiffs supplemental state law claims under 28 U.S.C. § 1367. Following a bench trial, the district court entered findings of fact and conclusions of law, and entered judgment in favor of the Board on all claims. Plaintiffs filed a timely notice of appeal.

II.

Plaintiffs argue that the district court erred in upholding the Board's determination. Under state law, a plaintiff has the burden of showing that the board of adjustment's decision is illegal or an abuse of discretion. *Board of Adjustment v. Winkles*, 832 S.W.2d 803, 806 (Tex.App.--Dallas 1992, writ denied).

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limited circumstances set forth in Local Rule 47.5.4.

The test for abuse of discretion is whether the board of adjustment acted arbitrarily, unreasonably, or without reference to any guiding legal principals. *Board of Adjustment of Dallas v. Patel*, 882 S.W.2d 87, 89 (Tex.App.--Amarillo 1994, writ denied).

A municipality's power to terminate existing property uses rendered nonconforming under zoning ordinances is a valid exercise of the police power. *City of University Park v. Benners*, 485 S.W.2d 773, 777-78 (Tex. 1972). Under the "amortization" technique used to determine the appropriate termination date, the property owner should be permitted a reasonable opportunity to recoup his investment in the structure at the time of the zoning change. *Id.* at 778-79. Section 51A-4.704(a)(1) of the

Dallas Development Code provides in relevant part:

> Any person may request that the board establish a termination date for a nonconforming use. Upon receiving such a request, the board shall provide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized within a definite time period. The following factors must be considered by the board in determining a reasonable amortization period;
>
> (A) The owner's capital investment in the structures on the property at the time the use became nonconforming.

Dallas Development Code, § 51A-4.704(a)(1) (emphasis added).

Plaintiffs contend that, in accordance with this provision, the Board was required to consider evidence of capital investments made by the previous owner prior to the nonconformity. In

other words, Plaintiffs claim that they, as current owners, are entitled to amortize the "innocent" investments of the individual who owned the property at the time the use became nonconforming. Their argument rests primarily on two Texas Court of Appeals cases. *See Board of Adjustment of Dallas v. Patel*, 882 S.W.2d 87, 89 (Tex.App.--Amarillo, writ denied) (holding that "the current owner is entitled to amortize the remainder of the original owner's investment in the property at the time of nonconformity"); *followed by Board of Adjustment of Dallas v. Patel*, 887 S.W.2d 90, 93 (Tex.App.--Texarkana 1994, writ denied).

Because this state law claim was before the district court under its pendant jurisdiction, the court appropriately applied Texas law. *Willis*

v. Roche Biomedical Lab., Inc., 61 F.3d 313, 314 (5th Cir. 1995). We review *de novo* the district court's determination of state law. *Id.* at 315. Sitting as an *Erie* court,[3] we are bound to apply the substantive law of the state "as interpreted by the state's highest court." *Texas Dep. of Housing & Community Affairs v. Verex Assurance, Inc.*, 68 F.3d 922, 928 (5th Cir. 1995) (internal quotation marks omitted). However, the opinion of an intermediate state law court "is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would

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[3] Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. 233, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

Upon careful consideration, we do not believe that the Texas Supreme Court would agree with the holdings in the *Patel* cases that the current owner is entitled to amortize the original owner's investments in the property's structure.[4] The only logical and reasonable reading of §51A-4.704(a)(1) is that "owner" refers to the owner then before the Board, that is, the current owner of the property. Amortization is intended to compensate the owner whose use of the property *becomes* nonconforming because of a zoning change, by allowing him a

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[4] We note that neither case provides any reasoning to support their interpretation of § 51A-4.704(a)(1).

reasonable time to recoup his investment in the structures on the property. The *Patel* courts would allow an owner who purchased the property with constructive or actual notice of its nonconforming use to benefit from the prior owner's investment in the property before it became nonconforming. The owner who purchases a nonconforming property is in no different a position than someone who invests in a nonconforming use after the zoning change. *See Neighborhood Comm. on Lead Pollution v. Board of Adjustment of the City of Dallas*, 728 S.W.2d 64, 70 (Tex.App.--Dallas, writ. ref'd n.r.e.)(holding that there is no right to amortize investments in the nonconforming use made after the zoning change); *City of Garland v. Valley Oil Co.*, 482 S.W.2d

342, 346 (Tex.Civ.App.--Dallas 1972, writ ref'd n.r.e.)(holding that plaintiff was not allowed to amortize the $20,000 paid for the land where it was bought after the zoning change, and stating that an "additional investment in a nonconforming use cannot extend the period of amortization"), cert. *denied*, 411 U.S. 933, 93 S.Ct. 1902, 36 L.Ed. 2d 392 (1973).

In this case, Plaintiffs purchased the property after its use had become nonconforming. Accordingly, we agree with the district court's determination that the Board was not required to consider evidence of the previous owner's investments in the property prior to its nonconformity for purposes of determining an appropriate amortization period.

III.

For the foregoing reasons, we AFFIRM.